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IN THE

Supreme Court of the United States

DARIUS D. BISHOP, ALVIN C. FLEMING, and JOHN F. BROWN,

Petitioners,

v.

STATE OF NEW JERSEY and THE NEW JERSEY DEPARTMENT OF PERSONNEL AND MERIT SYSTEM BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners' Complaint in this case alleges violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"), the Uniform Guidelines on Employee Selection Procedures adopted pursuant to Title VII, a 1980 Consent Decree, the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42 ("LAD"). All of their claims stem from a discriminatory examination, which was used to create an eligibility list of firemen who could be promoted to the position of fire captain for the City of Newark.

The Third Circuit affirmed the District Court's dismissal of petitioners' Complaint on the grounds that it was barred by the statute of limitations, due to petitioners' failure to file an EEOC charge within 300 days of the publication of the eligibility list. The limited issue raised in this Petition for Certiorari is whether the Third Circuit erred in refusing to apply the continuing violation theory to petitioners' Title VII claims on the grounds that the discriminatory act was limited to the publication of the list, and did not extend to promotions made from the list.

LIST OF PARTIES

The petitioners in this action are Darius D. Bishop ("Bishop"), Alvin C. Fleming ("Fleming") and John F. Brown ("Brown"). The other plaintiffs to the District Court action, Eric Barnes, Charles D. Bishop, Willie J. Booker, Samuel Evans, Todd Hayes, William E. James and Curtis Johnson, did not pass the 2000 fire captain examination, and thus, were not parties to the appeal to the Third Circuit.

The respondents to this petition are the State of New Jersey and the New Jersey Department of Personnel and Merit System Board. Because the District Court Complaint against defendants City of Newark and the Newark Fire Department was not dismissed by the District Court, those defendants were not involved in the issue that was raised with the Court of Appeals or in this petition.

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Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Filed January 5, 2004 ..... 1a

Appendix B — Opinion Of The United States District Court For The District Of New Jersey Dated March 10, 2003 ..... 13a

Petitioners respectfully petition for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The District Court's Opinion by the Honorable John W. Bissell, Chief Judge, granting defendants' Motion to Dismiss was issued on March 10, 2003 and was not otherwise published. *See* Appendix B. The Court of Appeals' Opinion affirming the District Court was filed on January 5, 2004 and was not otherwise published. *See* Appendix A.

STATEMENT OF JURISDICTION

The Third Circuit entered its Opinion and Order on January 5, 2004. *See* Appendix A. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 United States Code § 2000e-5(e)(1) Title VII of the Civil Rights Act of 1964

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except, that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to

institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF CASE

Petitioners are three of ten African-American firefighters employed by the Fire Department in Newark, New Jersey, who filed a disparate impact case against the City of Newark and the State of New Jersey based on the 2000 New Jersey Department of Personnel Fire Lieutenant/Fire Captain promotional examination. On April 12, 2001, the list of the successful candidates eligible for fire captain positions was published ("the list or the eligibility list"), based on the results of the 2000 examination. Out of the 287 applicants, 129 individuals passed the examination: 91 of the successful applicants were White, 26 were Black and 12 were Hispanic.

Thus, the test results demonstrated that there was a significant disparity as to the Black candidates, with a statistical deviation of 3.81 units, well above the standard deviation criteria of 2.00. The 2000 exam selection rate for African Americans is approximately 53%, which is substantially lower than the 80% rate established in the Uniform Guidelines on Employee Selection Procedures. This evidence clearly established a *prima facie* case of discrimination.

Petitioners Bishop, Fleming and Brown passed the examination. Bishop received a score of 82.320 and was ranked 66 on the list. Fleming received a score of 83.520 and was ranked 56. Brown received a score of 79.380 and was ranked 93.

On or about April 12, 2001, Bishop filed an administrative appeal with the Merit System Board/ Department of Personnel, challenging the format and the administration of the 2000 exam. That appeal was denied in July, 2002.

On January 21, 2001, shortly after fifteen appointments were made from the list, petitioners, along with other firemen, filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") against the Newark Fire Department, alleging that utilization of the 2000 exam operated to exclude them based upon race, in violation of Title VII. On April 9, 2002, the EEOC issued a Right to Sue.

On February 19, 2002, the City of Newark made twelve additional promotions from the list. On July 22, 2002, thirteen more promotions were made from the list.

On May 7, 2002, petitioners filed a Complaint in the United States District Court for the District of New Jersey, Newark Vicinage, against the Newark Fire Department, the City of Newark, the State of New Jersey and the New Jersey Department of Personnel and Merit System Board (collectively referred to as "the State"), alleging violations of Title VII, the Uniform Guidelines on Employee Selection Procedures, a 1980 Consent Decree, Section 1981 and the LAD.

On July 9, 2002, the State filed a Motion to Dismiss in lieu of filing an Answer on the grounds of Eleventh Amendment immunity and failure to exhaust administrative remedies.[1] The City of Newark also filed a Motion to Dismiss on essentially the same grounds as the State.

On August 2, 2002, the petitioners filed a Charge of Discrimination with the EEOC against the State, alleging that the utilization of the 2000 fire captain promotional examination had a disparate impact on petitioners, that the eligibility list derived from the examination was defective and that the use of the use of the eligibility list continues to violate petitioners' Title VII rights.

On September 26, 2002, the District Court entered an Order and Opinion granting the State's Motion to Dismiss and granting in part and denying in part the City's Motion to Dismiss. On October 9, 2002, at the request of petitioners' counsel, the EEOC issued a Right to Sue.

Thereafter, on November 14, 2002, petitioners filed the instant action against the State and the City of Newark, alleging violations of Title VII, the LAD and Section 1981. On January 28, 2003, the State filed a Motion to Dismiss petitioners' Complaint in lieu of filing an Answer on the grounds of the action was barred by *res judicata* and collateral estoppel. On March 11, 2003, the District Court granted the State' Motion and dismissed petitioners' Complaint.

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1. The State also sought to have the District Court decline supplemental jurisdiction over the state law claim and abstain from exercising jurisdiction under the *Buford* doctrine.

On April 4, 2003, petitioners appealed the dismissal based on the limited issue of whether the ongoing use of the eligibility list to promote fire captains constituted a continuing discriminatory act under Title VII. On November 20, 2003, the Third Circuit heard oral arguments on the case and, on January 5, 2004, issued an Opinion affirming the District Court's Order dismissing petitioners' Complaint against the State.

REASONS FOR GRANTING THE PETITION

The question of whether the continuing violation theory should be applied to the use of the fire captain eligibility list, promulgated based on a discriminatory examination, during the entire period that the list is in effect is an issue of far reaching significance, because states and municipalities across the Country utilize such lists to hire or promote employees and there is a split among the Circuits regarding the application of this doctrine to eligibility lists.

Four of the Circuit Courts of Appeal, including the Third Circuit, have considered the application of the continuing violation theory to eligibility lists, with the Third and the Sixth Circuits declining to apply this principle to such lists and the Second and the Fifth Circuits ruling that use of an eligibility list for promotion or hiring constitutes a continuing violation.

The Third Circuit held that the use of the eligibility list to promote fire captains was a neutral act flowing from the alleged discriminatory examination, which did not constitute a continuing violation to extend the statute of limitations. As stated, the Third Circuit's ruling is in accord with the Sixth Circuit, however, it is in direct conflict with the Second and Fifth Circuits.

As this Court is well aware, employment discrimination continues to be one of the most important rights protected by law. Moreover, it has been well established that the procedural requirements of Title VII should be liberally construed in order to further its goals.

These principles mandate that an employee be given every opportunity to contest the testing mechanism used to decide hiring and firing. Petitioners contend that the Third Circuit's ruling in this case is patently incorrect because it deprives them of their right to protect themselves from discrimination, when their rights are repeatedly violated each time promotions are made from the list.

Thus, the question raised by this petition is of critical importance, because it concerns an ongoing problem, which is not treated uniformly across the country and, therefore, warrants the Court's direction to unify the split among the Circuits.

I. Review Is Necessary To Resolve A Conflict Between The Circuits Regarding The Application Of The Continuing Violation Theory

Title VII requires an aggrieved employee to file an EEOC charge against a state or local authority within 300 days after the occurrence of the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(f)(1); *Bihler v. Singer Co.*, 710 F.2d 96, 97 (3d Cir. 1983). In determining whether an EEOC charge has been timely filed, the Courts look to the specific discriminatory conduct identified in the charge. *See Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980).

This Court has determined that certain acts, such as discharge, failure to promote, denial of a transfer or refusal to hire, are discrete acts that can be pinpointed to a specific time point for statute of limitations purposes. *See Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002); *cf. Miller v. Beneficial Management Corp.*, 977 F.2d 834, 844 (3d Cir. 1992) (repeated failure to promote is distinguishable from a single discrete act). However, not all acts of discrimination are capable of such precise categorization, which has lead to the creation of an exception to the statute of limitations for cases involving ongoing acts of discrimination, which is known as the "continuing violation" doctrine. *Harel v. Rutgers, State Univ.*, 5 F. Supp. 2d 246, 261 (D.N.J. 1998), *aff'd*, 191 F.3d 444 (3d Cir. 1999), *cert. denied sub nom, Harel v. Lawrence*, 528 U.S. 1117 (2000).

In order to establish a continuing violation, a claimant must show that at least one discriminatory practice occurred within the relevant filing period, *see Ricks, supra*, 449 U.S. at 256-58, and that the discriminatory acts are not "isolated or sporadic acts of intentional discrimination." *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995). The Third Circuit has invoked the continuing violation theory in cases in which the plaintiff alleges that the defendant has followed a practice of successive discriminatory violations, *see Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168 (3d Cir. 1978), *cert. granted*, 454 U.S. 1140 (1982), and in cases where the employer's promotion decision-making process took place over a period of time. *See Miller, supra*, 977 F.2d at 844.

A. The Third Circuit Erred In Rejecting The Continuing Violation Theory.

However, in the case at bar, the Third Circuit rejected the continuing violation doctrine by relying on *Bronze Shields*, *supra* and *Ricks*, *supra*, finding that the promulgation and each use of the eligibility list was a neutral discrete act that was separate from the discriminatory examination. (App. A at. 7a-10a). In reaching its conclusion, the Court rejected petitioners' contention that they did not know with certainty that they would not be promoted until the end of the effective period of the list. (App. A at 10a-11a).

Petitioners respectfully contend that, in analyzing this issue, the Third Circuit misplaced reliance on both *Bronze Shields* and *Ricks*, which are factually distinguishable from the within matter. Specifically, in *Bronze Shields*, the plaintiffs were not listed on the eligibility roster and, thus, knew at the time the list was published that they would be promoted, so that their cause of action accrued on the date the list was published. *Bronze Shields*, *supra*, 667 F. 2d at 1083. In contrast, here, petitioners were in a completely different situation because they had been placed on the eligibility list and, accordingly, had a chance of being promoted during the entire period that the list was in effect.

A further distinction between *Bronze Shields* and the present case is that the eligibility list in *Bronze Shields* had not been used before plaintiffs filed their EEOC charge. *Id.* Indeed, in *Bronze Shields*, the Court specifically left open the issue of whether the statute of limitations would have tolled if the eligibility list was operational, as here, yet, in affirming the District Court, the Third Circuit completely relied on *Bronze Shields* as if the issue had been addressed. *Id.*, n.23 (App. A at 9a-10a).

The Third Circuit was equally incorrect in relying on the *Ricks* case, which is based on a completely different set of facts than the case at bar. This Court held in *Ricks* was that the continuing violation theory did not apply to claims based on isolated instances of past discrimination, in finding that the professor's denial of tenure was the discriminatory act and not the manner in which he was later terminated. *Ricks*, *supra*, 449 U.S. at 257-58. However, in the present case, petitioners are not alleging isolated instances of discrimination, but instead, base their claim on an ongoing and continuing practice of discrimination that began with the 2000 promotional examination and continues with each promotion made from the list derived from that examination.

Similarly, the Third Circuit misplaced reliance on *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000), where the Sixth Circuit found that a continuing violation did not exist during the effective period of the list based on the Court's concern of "expos[ing] employers to virtually open-ended period of liability." *Id.* at 205. The Sixth Circuit's rationale is defective, and thus, should not have been adopted by the Third Circuit because the continuing violation theory would not expose an employer to open-ended liability, since eligibility lists have a limited life span, thereby restricting an employer's exposure. More importantly, the Sixth Circuit's holding promotes unnecessary litigation, because it forces potential claimants to file claims at the time the list is published, when they could still be promoted during the period that the list is in effect, would result in cases being filed that ultimately would be moot.

For example, in this case, Fleming, who was listed 56 out of the 129 on the list, may be reached for promotion before the list expires. However, under the *Cox* rationale

adopted by the Third Circuit, he, along with the other petitioners, should have filed a charge of discrimination when the list was published, even though he had a chance of being promoted during the effective period of the list. Instead, it is the continued use of the list, stemming from the discriminatory examination, which has an adverse affect on petitioners, because another act of discrimination occurs every time the list is used and petitioners are denied a promotion, which together constitute a pattern of discrimination.

Indeed, in the wake of September 11th, our entire nation is all too aware of the risks that our firemen and policemen assume in the performance of their daily job duties. The relevance of this risk is that it demonstrates that the composition of an eligibility list could drastically change in any given tragic moment, causing a person with a low rank, who may have been otherwise ineligible, to rise to a position of eligibility with one fell swoop.[2]

B. The Third Circuit's Holding Is In Conflict With Other Circuits.

The Third Circuit's decision is in absolute conflict with the Second and Fifth Circuits, which have applied the continuing violation doctrine to cases involving hiring or promotion eligibility lists. *See Guardian Ass'n v. Civil Service Comm'n*, 633 F.2d 232 (2d Cir. 1980), *cert. granted*, 454 U.S. 1140 (1982); *Walls v. Mississippi State Department Of Public Welfare*, 730 F.2d 306 (5th Cir. 1984). In *Guardian*, black and Hispanic police officers challenged the written

2. Similarly, a series of incidents could cause a firehouse or police station to suffer an unusually large loss of employees, thereby impacting the status of individuals on an eligibility list.

examinations used in making appointments to the New York City Police Department on the basis that they had a racially disparate impact. The defendants argued, as respondents argue in the case at bar, that the utilization of the examination-based eligibility lists was "merely the non-actionable perpetuation of the effects of past" discrimination. *Guardian, supra*, 622 F.2d at 249. The Second Circuit rejected this argument holding that:

> By utilizing the tainted test results for years after becoming subject to the commands of Title VII, defendants continued a course of discriminatory conduct that had indeed begun before the effective date of the Act but did not cease until defendants abandoned the practice of making hiring decisions in this manner. Even if the unjustified refusals to hire did not compromise the core of defendants' discriminatory conduct, at the very least they represented the culmination of a continuously maintained illegal employment policy.

Id.

The Fifth Circuit adopted the Second Circuit's rationale in *Walls*, which centered around the use of certificates of eligibility based on, *inter alia*, test results to hire certain state employees. The Fifth Circuit expressly rejected the position adopted by the Third Circuit in this case, that the use of the test results to determine eligibility was only an effect of a past illegal act, instead finding that the use of the invalid test results to determine eligibility for vacancies or ranking on eligibility certificates constituted a continuous violation for purposes of Title VII. *Id.* at 381-19. *See also Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir.

1980) (Fifth Circuit applied the continuing violation theory to discrimination claims arising out of a test that had a disparate impact, because the employer continued to use the test results to offer jobs); *Beavers v. American Cast Iron Pipe Company*, 975 F.2d 792, 796 (11th Cir. 1992) (The Eleventh Circuit recognized the Fifth Circuit's continuing violation standard for employment practices as set forth in *Gonzalez*, *supra*).

Thus, there is a direct conflict between the Circuits regarding the application of the continuing violation theory to cases involving the use of eligibility lists based on discriminatory examinations. The resolution of this conflict would have a widespread impact beyond this particular case, as states and municipalities across the country frequently utilize eligibility lists to hire or promote employees. Petitioners, therefore, respectfully urge the Court to consider the issue raised in this petition, in order to unify the Circuits regarding the application of the continuing violation theory to promotion and hiring eligibility lists.

CONCLUSION

Based on the foregoing, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 5, 2004

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-1996

DARIUS D. BISHOP; ERIC BARNES; CHARLES D. BISHOP; WILLIE J. BOOKER; JOHN F. BROWN; SAMUEL EVANS; ALVIN C. FLEMING; TODD HAYES; WILLIAM E. JAMES; CURTIS JOHNSON,

Appellants,

v.

STATE OF NEW JERSEY; THE NEW JERSEY DEPARTMENT OF PERSONNEL AND MERIT SYSTEM BOARD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Civ. No. 02-cv-05458
District Judge: The Honorable John W. Bissell, Chief Judge

Argued November 20, 2003

Before RENDELL, BARRY, and MAGILL,* Circuit Judges.

* The Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

(Opinion Filed: January 5, 2004)

OPINION

BARRY, *Circuit Judge*

I. BACKGROUND

The parties are familiar with the facts of this case, and, thus, we will provide but a brief summary of those facts at the outset, incorporating additional facts only as necessary to our discussion of the issues.

Plaintiffs/appellants are African-American firefighters, employed by the Newark Fire Department. In 2000, each plaintiff took the New Jersey Department of Personnel Fire Lieutenant/Fire Captain promotional examination, an exam administered by the State. On April 12, 2001, the results were released when the list of successful applicants eligible for promotion was promulgated by the New Jersey Department of Personnel and Merit System Board. Of the 287 men and women who took the exam, 129 passed and were listed in order of their score, from highest to lowest. Municipalities use this list to promote firefighters on the list in the order in which they are ranked as positions become available. The list is valid and in use until it expires on April 3, 2004.

Plaintiffs Darius Bishop, Alvin Flemming, and John Brown each passed the exam, and were ranked 66, 56, and 93 respectively.[1] Plaintiffs claim that the format and

1. These three are the only plaintiffs appealing the District Court's order. The other plaintiffs failed the examination, and it is clear that the statute of limitations has run as to them. *See Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir.1981).

administration of the exam discriminated against minorities as evidenced by the disproportionately low numbers of minorities who passed the exam and the disproportionately lower ranking of those minorities who passed.

On April 12, 2001 (the day that the eligibility list was promulgated), Bishop filed an administrative appeal with the Merit System Board/Department of Personnel challenging the format and the administration of the exam. On January 21, 2002, plaintiffs filed a Charge of Discrimination with the EEOC against the Newark Fire Department only, alleging that the exam unlawfully operated to exclude them based upon race. On April 9, 2002, the EEOC issued to Bishop a Right to Sue letter with respect to his charge against the Newark Fire Department.

On May 7, 2002, plaintiffs filed their first complaint in the U.S. District Court for the District of New Jersey against the State of New Jersey and the New Jersey Department of Personnel and Merit System Board ("State Defendants"), and against the City of Newark and the Newark Fire Department ("City Defendants"), alleging violations of the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("§ 1981"); Title VII of the Federal Civil Rights Act, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"); and the Uniform Guidelines on Employee Selection Procedures issued by EEOC.[2] This complaint alleged that the nature and administration of the exam disproportionately excluded plaintiffs from promotion because of their race.

2. Plaintiffs also alleged violations of a 1980 Consent Decree between the City of Newark and the U.S. Department of Justice ("Consent Decree"), and violation of the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-1, *et seq.* ("LAD").

Appendix A

On June 3, 2002, Bishop's administrative appeal to the Merit System Board was denied. On July 9, 2002, defendants in the first action filed motions to dismiss, claiming sovereign immunity and plaintiffs' failure to exhaust administrative remedies. On August 2, 2002, plaintiffs filed a Charge of Discrimination with the EEOC against the State Defendants, alleging that the exam had a disparate impact on plaintiffs, that the results were defective, and that plaintiffs were discriminated against in the preparation, administration, and validation of the exam.

On September 26, 2002, the District Court granted the State Defendants' motion to dismiss plaintiffs' first action as to them, and granted in part and denied in part the City Defendants' motion to dismiss. Most relevant to this appeal, the District Court dismissed plaintiffs' Title VII claim against the State Defendants because plaintiffs failed to name them in their first Charge of Discrimination filed with the EEOC.[3] Claims against the City Defendants remain pending in the first action.

On October 9, 2002, the EEOC issued to plaintiffs a Right to Sue letter with respect to the State Defendants.

3. The District Court also dismissed plaintiffs' EEOC Guidelines claim because the guidelines do not provide an independent cause of action; dismissed plaintiffs' Consent Decree claims for lack of standing because they were not parties to that decree; dismissed plaintiffs' § 1981 claim against the State Defendants on the ground of Eleventh Amendment immunity, but sustained their § 1981 claim against the City Defendants; and dismissed plaintiffs' LAD claims against the State Defendants while sustaining those claims against the City Defendants.

Appendix A

On November 14, 2002, plaintiffs filed their Complaint ("Complaint") in this action against the State Defendants, alleging violations of Title VII, LAD, § 1981, and the Consent Decree. Plaintiffs noted that they filed a Charge of Discrimination with the EEOC within 300 days of the last commission or the discriminatory employment practice—namely, the promotion of applicants from the eligibility list on July 20, 2002.

On December 18, 2002,[4] the State Defendants moved to dismiss the Complaint. On March 11, 2003, the District Court granted the State Defendants' motion, concluding that plaintiffs had not filed a charge with the EEOC within 300 days of the alleged discriminatory act, as mandated by 42 U.S.C. § 2000e-5(e)(1); that plaintiffs were not entitled to equitable tolling while Bishop's administrative appeal was pending; and that the use of the eligibility list was not a continuing violation.[5]

Plaintiffs Bishop, Flemming, and Brown now appeal. We must decide from which date the 300 day statute of limitations for plaintiffs to file their charge with the EEOC should run: the date of the promulgation of the eligibility

4. Plaintiffs claim in their brief to us that this motion was filed on January 28, 2003.

5. The District Court also dismissed plaintiffs' § 1981 claim under the doctrine of res judicata because it had dismissed that claim in the first action and plaintiffs did not brief the issue when the motion to dismiss was pending. It dismissed plaintiffs' LAD claim because it had dismissed all federal claims against the defendants.

list, or the later dates of either the most recent round of promotions or the date on which the list will expire.[6]

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, and had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. DISCUSSION

Our review of the District Court's dismissal of a cause of action for failure to state a claim as time-barred is plenary. *See, e.g., Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 251 (3d Cir. 2002).

Plaintiffs argue that the promotions and ongoing validity of the eligibility list (until it expires in April 2004) are continuing discriminatory acts, and therefore a continuing violation of Title VII. They argue that each promotion they do not receive is a separate discriminatory act which triggers the running anew of the statute of limitations within which they must file a charge with the EEOC. Defendants argue that these promotions and the ongoing validity of the eligibility list are merely the non-discriminatory effects of the alleged discriminatory format and administration of the exam, which culminated in the promulgation of the list. We agree with defendants and the District Court, and hold that the statute of limitations had run by the time plaintiffs

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6. Plaintiffs do not address the tolling issue in their briefs, and we do not reach it.

filed their charge against the State Defendants with the EEOC.[7]

Whether viewed separately or together, *Bronze Shields, Inc. v. New Jersey Dep't of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980) mandate our decision. In *Bronze Shields*, the plaintiffs were seeking to become Newark police officers and took a written exam administered by the New Jersey State Department of Civil Service. If they passed the exam, they would have been placed on an eligibility roster in the order in which they scored. When Newark needed to hire new police officers, it would screen applicants on this roster, starting with the applicant with the highest score; applicants who passed the screening were hired. Plaintiffs either failed the exam or some aspect of the screening process, and sued the State and the City for having violated Title VII.

The District Court dismissed the complaint because plaintiffs had not filed their charge with the EEOC within the statute of limitations—there, 180 days from the promulgation of the list. On appeal, plaintiffs argued that the eligibility roster was a continuing violation of Title VII

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7. The parties have briefed whether the State and City Defendants can be considered alter egos such that we should attribute to the State Defendants responsibility for the promotions made by the City Defendants. The District Court thought legitimate questions of fact existed with respect to this issue, and did not rule on it. But even if the State Defendants are deemed responsible for the promotions, these promotions, as we will explain, were the neutral effects of the alleged discriminatory acts, and so cannot serve as triggering dates for the statute of limitations.

for as long as it was in effect and, therefore, that their charge to the EEOC was timely because it was filed during the roster's effective period. We rejected that argument, and held that plaintiffs did not allege that Newark "would have followed anything but a neutral, non-discriminatory procedure in hiring from the list." *Id.* at 1083. The promulgation of the list was the only allegedly discriminatory act, and the continuing effectiveness of the list constituted merely a neutral effect of that act. Consequently, the charge filed with the EEOC was untimely, and we affirmed the District Court's dismissal of the complaint.

In *Bronze Shields,* we relied on the Supreme Court's decision in *Ricks,* in which the Court refused to apply the continuing violation theory. Ricks was a professor who had been denied tenure, and was instead offered a one-year terminal contract, after which his employment would be terminated. *Ricks,* 449 U.S. at 252-53. The District Court concluded that the statute of limitations for filing a charge with the EEOC began on the date Ricks was offered the terminal contract, not, as Ricks had argued, when the terminal contract expired. We reversed, but the Supreme Court reversed us, holding that to determine the timeliness of an EEOC complaint, a court must "identify precisely the 'unlawful employment practice' of which (plaintiff) complains." *Id.* at 257.

> "In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed

> discriminatorily from the manner in which the College terminated other professors who also had been denied tenure."[1]

Id. at 257-58. Ricks made no such allegation. The Supreme Court also held that because Ricks' termination was carried out in a neutral, non- discriminatory manner, the statute of limitations began to run when the termination decision was made and communicated to Ricks, "even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position— did not occur until later." *Id.* at 258. Applying *Ricks* in *Bronze Shields,* we concluded that the promulgation of the eligibility roster was the last allegedly discriminatory act by the defendants. *Bronze Shields,* 667 F.2d at 1083-84.[8]

Bronze Shields and *Ricks* compel our rejection of the continuing violation theory in this case. The discriminatory

8. We recently applied *Ricks* in *Watson v. Eastman Kodak Co.,* 235 F.3d 851 (3d Cir.2000). The plaintiff, Watson, received a letter stating that he was being terminated from his current position, and that he would be terminated from Kodak entirely if he did not find another position at Kodak within one month. Watson filed his EEOC charge within 300 days of his actual discharge, but not within 300 days of the receipt of the termination letter. Applying *Ricks,* we held that Watson's receipt of the termination letter was the act of discrimination that triggered the 300-day statute of limitations. Even though Watson may have stayed at Kodak if he found another position, his allegation of discrimination was with respect to losing the specific position he had held. Because the termination letter was unequivocal as to Watson losing this position, receipt of that letter was the triggering act. As in *Watson,* plaintiffs here identify the specific discriminatory act—the design and administration of the exam, and the promulgation of the list—from which the statute of limitations runs.

act that plaintiffs allege is the design and administration of the exam and the concomitant promulgation of the eligibility list.[9] The neutral use of the list by municipal fire departments is merely the effect of the alleged discriminatory exam. Therefore, the statute of limitations began running on the date that the eligibility list was promulgated.

Plaintiffs' argument that this case is different from *Bronze Shields* because the plaintiffs in that case *failed* the exam, whereas Bishop, Flemming, and Brown *passed,* is unpersuasive. Because these plaintiffs passed, their argument goes, the ongoing validity of the list until its expiration date, and the promotions made based upon it, constitute a continuing violation because plaintiffs are now stuck with their low ranking on that list and have no non- discriminatory avenue by which to seek a promotion. To require them to have filed their EEOC complaints 300 days after the promulgation of the list, but while they still remained on the eligibility list, could result in their being promoted after the filing of their charges and/or their lawsuit—a waste of judicial resources. Better, they contend, to wait until the last discriminatory act—whether that be the most recent round of promotions, or the failure to have promoted them when

9. Neither the charge filed with the EEOC, nor the Complaint, allege that the manner in which individuals were promoted from the list when vacancies arose was discriminatory. To the contrary, the Complaint alleges that the "disparate *impact* of the 2000 examination continues up to the present. On or about July 20, 2002, thirteen additional promotions were made utilizing the defective promotion list." Complaint at ¶ 41 (emphasis added). Only in their Reply Brief do plaintiffs suggest—albeit it without explanation—that the promotions themselves were discriminatory. This suggestion is both belated and bereft of support.

the list expires—to begin running the statute of limitations. While we appreciate plaintiffs' concern for the conservation of judicial resources, that concern does not transform neutral effects into discriminatory acts.

The Sixth Circuit has come to the same conclusion we do. In *Cox v. City of Memphis*, 230 F.3d 199 (6th Cir. 2000), the plaintiffs were white female police officers who passed a promotions examination, were placed on the eligibility list, but were never promoted. They claimed that the administration of the exam was discriminatory in violation of Title VII, but the EEOC dismissed their charges because they had not been filed within 180 days of the promulgation of the list. The Sixth Circuit evaluated the plaintiffs' continuing violation theory in light of their passing the exam, and concluded that the promotions of others or the failure of plaintiffs to be promoted were the *effects* of previous discrimination, and not continuing acts of discrimination themselves. The Court emphasized, in response to plaintiffs' argument that the fact that they passed the exam distinguished them from the plaintiffs in *Bronze Shields* who failed, that

> the mere possibility that one will be hired or promoted despite an allegedly discriminatory ranking does not mean that the failure to promote or hire should be treated as a discriminatory act separate from the original act of discrimination . . . . the assignment of an allegedly discriminatory ranking is the relevant discriminatory act even where the low ranking is not a "certain prelude" to an adverse employment action.

Cox, 230 F.3d at 205 (quoting *Huels v. Exxon Coal USA, Inc.*, 121 F.3d 1047, 1051 (7th Cir.1997)). We agree with both the Sixth Circuit's reasoning and its conclusion.

III. CONCLUSION

In sum, we reject plaintiffs' contention that the continuing violation doctrine applies. Plaintiffs do not allege any discriminatory acts related to the selection of names from the eligibility list for promotion. These promotions were neutral, non-discriminatory effects of the promulgation of the eligibility list. Because plaintiffs' EEOC charge was not filed within 300 days of this promulgation, it was time-barred.

The Order of the District Court will be affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ Maryanne Trump Barry
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 10, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 02-5458 (JWB)

DARIUS D. BISHOP, ERIC BARNES, CHARLES D. BISHOP, WILLIE J. BOOKER, JOHN F. BROWN, SAMUEL EVANS, ALVIN C. FLEMING, TODD HAYES, WILLIAM E. JAMES, and CURTIS JOHNSON,

Plaintiffs,

v.

STATE OF NEW JERSEY, THE NEW JERSEY DEPARTMENT OF PERSONNEL, and MERIT SYSTEM BOARD,

Defendants.

OPINION

BISSELL, *Chief Judge*

This matter comes before the Court on a motion by the defendants State of New Jersey and the New Jersey Department of Personnel ("NJDOP") and Merit System Board ("MSB") (collectively, the "State Defendants"). Plaintiffs filed a Complaint on November 14, 2002; defendants filed the instant motion to dismiss in lieu of filing

an answer. This Court has jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331, 1343 and 1367.

FACTS AND PROCEDURAL HISTORY[1]

Plaintiffs are all African-American males who are currently employed by the City of Newark as firefighters in the Newark Fire Department. (Op. of Sept. 26, 2002 at 3).[2] Plaintiffs have been employed with the City of Newark for an average of 15 years, and all have applied for, and taken the examination for, promotion to the classification of Fire Captain. (*Id.*) Defendants NJDOP and MSB are state agencies that are responsible for the creation and administration of promotional examinations for fire department personnel. (*Id.*)[3]

Plaintiffs allege that the State Defendants violated their civil rights by changing the format and the scoring for the most recent Newark Fire Captain (PM3589A) civil service examination to plaintiffs' detriment and, further, that the selection procedures used are discriminatory to Black and/or minority candidates. (Compl., ¶ 2).[4] Plaintiffs also allege

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1. A complete factual recitation may be found in this Court's Opinion of September 26, 2002.

2. This Opinion is attached to defendants' certification of attorney (hereinafter "Defendants' Cert.") as Exhibit C.

3. The Court mistakenly identified these separate agencies as a single entity in its previous Opinion. (Op. of Sept. 26, 2002 at 3).

4. Plaintiffs' Complaint is attached to Defendants' Certification of Attorney as Exhibit A.

that the State Defendants failed to use alternate methods of selection and violated the Uniform Guidelines on Employee Selection Procedures, the New Jersey Law Against Discrimination ("NJLAD") and 42 U.S.C. § 1981. (*Id.*) Plaintiffs seek compensatory and punitive damages, interest, costs, attorneys' fees and injunctive relief. (Compl. at 14-18).

Plaintiffs allegedly took the written portion of the 2000 Fire Captain Examination in June 2000[5] and the oral portion in December 2000. (Plaintiffs' Supp. Br., ¶¶ 1-3). On or about April 12, 2001,[6] the NJDOP released the eligibility list generated by the 2000 Fire Captain Exam. (*Id.*, ¶ 4). This list is scheduled to expire in April 2004. (*Id.*, ¶ 5). Also on or about April 12, 2001, plaintiff Bishop filed an appeal with the MSB regarding the format and administration of the 2000 Fire Captain Exam. (*Id.*, ¶ 6; Weiner Cert., Exh. A).

The State Defendants allegedly certified the eligibility list in December 2001, and 15 captains were appointed from the list.[7] (Plaintiffs' Supp. Br., ¶ 7). On or about January 21, 2002, plaintiffs filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"),

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5. The State Defendants contend that the written component of the 2000 Fire Captain Exam was actually administered on September 30, 2000. (Defendants' Br., ¶ 9). This discrepancy is irrelevant for the purposes of the instant motion.

6. The State Defendants contend that the eligibility list was issued on April 4, 2001. (Defendants' Br., ¶ 9). Again, this discrepancy is irrelevant for the purposes of the instant motion.

7. Plaintiffs do not specify who made the appointments.

naming only the Newark Fire Department as respondent. (*Id.*, ¶ 8; Weiner Cert., Exh. C). In February 2002, 12 additional captains were appointed from the list. (Plaintiffs' Supp. Br., ¶ 9). On April 9, 2002, the EEOC determined that it was unable to conclude that the information obtained from its investigation established statutory violations and issued a Right to Sue Notice. (*Id.*, ¶ 10; Weiner Cert., Exh. D).

On May 7, 2002, plaintiffs filed a nearly identical Complaint in this Court, Civ. Action No. 02-2219 ("*Bishop I*"), against the same State Defendants, in addition to several City of Newark defendants, alleging the same claims as in the instant Complaint. (Plaintiffs' Cert., Exh B).[8] On June 3, 2002, the NJDOP/MSB denied plaintiff Bishop's appeal of the format and administration of the 2000 Fire Captain Examination. (Weiner Cert., Exh. B). On or about July 22, 2002, 13 additional promotions were made from the eligibility list. (Plaintiffs' Supp. Br., ¶ 13).

On August 2, 2002, plaintiffs filed an EEOC charge of Discrimination against the State Defendants "solely in the remote chance the Court requires such a filing." (Weiner Cert., Exh. F at 2). On August 22, 2002, the State and City Defendants filed a motion to dismiss plaintiffs' Complaint. This Court granted the motion in its entirety against the State Defendants on September 26, 2002. (Plaintiff's Cert., Exh. C (Op. of Sept. 26, 2002 at 13-14). The Court also held that plaintiffs' § 1981 claims against the State Defendants were barred under the doctrine of Eleventh Amendment

8. *Bishop I* also included meritless claims under the 1980 Consent Decree and the Uniform Guidelines on Employee Selection Procedures, which are set forth in 28 C.F.R. 50.14.

immunity. (*Id.* at 17). Finally, the Court held that because all of plaintiffs' federal claims had been dismissed, their state law claims must be dismissed as well. (*Id.* at 21).

On October 9, 2002, plaintiffs received a special Notice of the Right to Sue from the U.S. Department of Justice, which read:

> Because you filed the above charge with the [EEOC], and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge and . . . because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII. . . . This notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

(Weiner Cert., Exh. G). Plaintiffs then filed the case at bar on November 14, 2002. On December 18, 2002, the State Defendants filed the instant motion to dismiss in lieu of filing an answer.

In the instant motion, the State Defendants argue that plaintiffs' claims are barred by *res judicata*, collateral estoppel and Eleventh Amendment immunity, and that plaintiffs also failed to exhaust administrative remedies since their first EEOC charge did not name the State Defendants and their second EEOC charge is untimely. (Defendants' Br.,

¶¶ 10-11). Plaintiffs contend that their second EEOC charge is timely because the 300-day time period was tolled during the pendency of Bishop's state administrative appeal and, moreover, the promotion of candidates from the eligibility list generated by the States Defendants constitutes a "continuing violation" of plaintiffs' civil rights. (Plaintiff's Br. at 4-5; Plaintiffs' Supp. Br. at 1-4). Plaintiffs also contend that the State Defendants and the City Defendants are an "integrated enterprise" or "single employer" for the purposes of Title VII and should therefore be counted as one employer. (Plaintiffs' Br. at 5-16).

DISCUSSION

I. Standard for Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a court is authorized to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)); *Conley v. Gisbon*, 355 U.S. 41, 45-46 (1957). In evaluating a motion under Rule 12(b)(6), the Court accepts all allegations and all reasonable inferences that can be drawn as true and views them in the light most favorable to the plaintiff. *Trump Hotels & Casino Resorts Inc. v. Mirage Resorts, Inc.*, 140 F.3d 478, 483 (3d Cir. 1998) . "A Rule 12 (b) (6) motion should be granted 'if it appears to a certainty that no relief could be granted under any set of facts which could be proved.'" *Morse v. Lower Merion School District*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *D.P. Enter. Inc. v. Bucks County Cmty. Coll.*, 725 F.2d 943, 944 (3d Cir. 1984).

Appendix B

II. Plaintiffs' Tittle VII Claims

Plaintiffs argue extensively that the State and City Defendants are so closely interrelated as to constitute one employer. (Plaintiff's Br. at 5-16). Although this issue was discussed tangentially in *Bishop I*, the Court did not rule on it. (Op. of Sept. 26, 2002 at 11-12). Plaintiffs' analysis in the instant case has shown that there is a legitimate question whether the State Defendants, through their supervisory and administrative roles, function as plaintiffs' "employer" under 42 U.S.C. § 2000e. Because discovery on this issue is appropriate, dismissal on a Rule 12(b)(6) motion is precluded

Assuming for the purposes of the instant motion that the State Defendant constitute plaintiffs' employer under 42 U.S.C. § 2000e, the Court still must determine whether plaintiffs' EEOC charge is timely filed. In New Jersey, Charges of Discrimination must be filed with the EEOC within 300 days of the accrual of an employee's claim against his employer. 42 U.S.C. § 2000e-5(e). Plaintiffs' first EEOC charge was filed in January 21, 2002, but it was filed only against the Newark Fire Department. This Court already determined in *Bishop I* that plaintiffs' failure to name the State Defendants in their original EEOC charge precludes plaintiffs from suing those defendants for Title VII violations in this Court. (Op. of Sept. 26, 2002 at 13-14). Plaintiffs now attempt to circumvent that ruling by arguing that their second EEOC charge "cured the jurisdiction defect and satisfied the exhaustion requirement as contemplated by the policies of Title VII." (Plaintiffs' Br. at 4).

Appendix B

Plaintiffs correctly assert that the timely filing of a Charge of Discrimination with the EEOC is actually not a jurisdictional prerequisite to suit in federal court but a requirement that is subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Communications Workers of Am. v. N.J. Dep't of Personnel*, 282 F.3d 213, 216-17 (3d Cir. 2002). Thus, plaintiffs must establish that their second EEOC charge is either timely at the outset or subject to equitable tolling on the facts of this case.

1. Plaintiffs are not Entitled to Equitable Tolling

Plaintiffs argue that their "re-filed" EEOC charge in August 2002 is timely because it is based on the State Defendants' June 3, 2002 denial of plaintiff Bishop's appeal, rather than the January 2001 promulgation of the eligibility list. (Plaintiffs' Br. at 5). In other words, Bishop's appeal to the MSB on the date the list was promulgated in April 2001 purportedly tolled the running of the statutory period in which plaintiffs needed to file an EEOC charge until June 3, 2002, the date on which Bishop's appeal was denied. Plaintiffs therefore assert that their EEOC charge filed in August 2002 is well within 300 days of the State Defendants' adverse determination on June 3, 2002, which event allegedly forms the basis for the instant lawsuit. (*Id.*)

First, the Court notes that plaintiffs do not cite any relevant case law to support this argument. Second and more importantly, plaintiffs' argument was effectively denied in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In that case, the plaintiff professor was officially denied

tenure in March 1974, and he immediately appealed that decision with the college's Educational Policy Committee ("EPC"). (*Id.* at 252). On June 26, 1974, Ricks was offered a one year "terminal" contract, which he accepted on September 4, 1974. (*Id.* at 252). Shortly thereafter, on September 12, 1974, Ricks was notified that the EPC denied his grievance, and he filed a charge with the EEOC in April 1975. (*Id.* at 254). The Supreme Court rejected Ricks' contention that the date the grievance committee denied his grievance started the limitations period: "[E]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." (*Id.* at 261) (emphasis in original); *see also Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1416-17 (3d Cir. 1991) (recognizing that *Ricks* "implicitly created a notice requirement to trigger the limitations period; that is, when the employer had established its official position and made that position apparent to the employee by explicit notice.") The Court in *Ricks* also reiterated its holding that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations period[]." 449 U.S. at 261 (citing *Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976)).

Similarly, in the case at bar, plaintiff Bishop merely availed himself of a grievance procedure that did not toll the limitations period when he appealed the format and administration of the 2000 Fire Captain Exam to the MSB. *See Ricks*, 499 U.S. at 261. The official eligibility list which

was issued by the NJDOP and used by the City Defendants to make promotions was known to plaintiffs as of the date of its promulgation on or about April 12, 2001. Indeed, plaintiffs argue in their opposition brief that their claims are timely because "they had not obtain [sic] a decision from the [State Defendants] as to *whether the discriminatory act would be remedied* until June 3, 2002." (Plaintiffs' Br. at 5) (emphasis added). Under *Ricks*, however, plaintiffs cannot now rectify their failure to include the State Defendants in their original EEOC charge when they were aware of the State Defendants' alleged discriminatory actions long before Bishop's appeal, or grievance, was denied on June 3, 2002.

2. Use of the Subject Eligibility List was not a Continuing Violation

Plaintiffs also assert that the State and City defendants' continuing use of the eligibility list constitutes a "continuing violation" justifying their second EEOC charge. (Plaintiffs' Supp. Br. at 1-4). Although the list was issued in April 2001, it was used to make promotions several times in December 2001, February 2002 and July 2002. (*Id.*, ¶¶ 7, 9. 13). Plaintiffs contend that the fact that the list was used within 300 days of their second EEOC charge brings their situation within the continuing violation exception and distinguishes if from *Bronze Shields v. N.J. Dept. of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981). (*Id.* at 2).

In *Bronze Shields*, the Third Circuit held that "the use of an eligibility roster does not constitute a continuing violation." (*Id.* at 1082). The plaintiffs in that case knew as of the date the eligibility roster was issued on May 3, 1975

that they would not be hired by the defendant police department because they were not on the roster, but they did not file a charge with the EEOC within 180 days of May 3, 1975. (*Id.* at 1083). The court determined that the injury to plaintiffs was "'a delayed, but inevitable consequence' of *the allegedly discriminatory employment procedure - here a specific identifiable act, the promulgation of the hiring roster.* It is unlike, therefore, a continuing practice such as in *Bethel v. Jendoco, supra*, which manifested itself only in individual hiring rejections." (*Id.* at 1084 (comparing *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1163 (3d Cir. 1978)) (emphasis added).

Plaintiffs emphasize footnote 23 of *Bronze Shields*, in which the court distinguished that case from the Second Circuit case of *Guardians Ass'n of the N.Y. City Police Dept., Inc. v Civil Serv. Comm'n of the City of N.Y.*, 633 F.2d 232, 249 (2d Cir. 1980) (holding that the defendants' use of an allegedly discriminatory eligibility list "continued a course of discriminatory conduct" over several years, thus constituting a continuing violation). (*Id.* at 1083 n.23; Plaintiffs' Supp. Br. at 2). The Third Circuit stated that under the holding in *Guardians*, if the defendant had actually used the list within the 180 day statutory period before the plaintiffs filed, their filing would have been timely. *Bronze Shields*, 667 F.2d at 1083 n.23. However, the court declined to follow the Second Circuit and, in a case decided one year later, reaffirmed its holding in *Bronze Shields*. *See Hood v. N.J. Dep't of Civil Serv* , 680 F.2d 955, 958-59 (3d Cir. 1982).

Here, plaintiffs argue that because the State Defendants actually used the list in December 2001, February 2002 and

July 2002, their situation may be distinguished from the holding in *Bronze Shields* and analogized to the holding in *Guardians*. In fact, Judge Higgenbotham makes this very argument in his dissent in *Bronze Shields*, (*id.* at 1091-93), and Judge Sloviter expanded upon it in her dissent in *Hood*, 680 F.2d at 961. Judges Higgenbotham and Sloviter argue that the better approach would be to permit timely filing of a charge with the EEOC to extend from the promulgation of the list to 180 days after its expiration. *Hood*, 680 F.2d at 960; *Bronze Shields*, 667 F.2d at 1093. In both *Hood*, and *Bronze Shields*, however, the court majorities focused upon the fact that the alleged discriminatory policy was isolated to a specific, identifiable act: the drafting of the eligibility roster. *Hood*, 680 F.2d at 958-59;[9] *Bronze Shields*, 667 F.2d at 1083; *Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053, 1060 (D.N.J. 1990). Therefore, this Court is constrained by the majority opinions in both *Bronze Shields* and *Hood*.

The Court also notes that the Third Circuit has not moved away from its holdings of 20 years ago; indeed, the court included in a recent case a parenthetical explaining *Bronze Shields*: "when plaintiffs challenged legality of hiring decision, claim accrued when they received notice that they had failed the examination and were not on the hiring roster [*i.e.*, when the roster was issued], not when roster, expired." *Watson v. Eastman Kodak Co.*, 235 F.2d 851, 857 (3d Cir. 2000); *see also Cox v. City of Memphis*, 230 F.3d 199, 204

9. However, the court in *Hood* never actually reached the question whether continuing use of the list constitutes a continuing violation because plaintiff Hood did not file a charge with the EEOC until more than three years after the last use of the list. 680 F.2d at 959).

(6th Cir. 2000) (endorsing the Third Circuit's decisions in Hood and Bronze Shields). The court in *Cox* stated,

> This Court believes the better view if that promotion or hiring from an allegedly tainted promotions roster is not a 'continuing act' but is merely the effect of previous discrimination. It is at the point of promulgation of the roster that a potential plaintiff is aware that alleged discrimination is likely to play a pivotal role in her future advancement. Hence, the promulgation of an allegedly tainted roster is an event that should alert the average lay person to protect his rights.

Cox, 230 F.3d at 204 (internal quotations and citations omitted). Accordingly, this Court concludes that plaintiffs' second EEOC charge is untimely, and plaintiffs are not entitled to equitable tolling. Plaintiffs are still precluded from bringing Title VII claims against the State Defendants in this Court.

III. Title 42 U.S.C. § 1981

This Court explicitly held in *Bishop I* that plaintiffs' § 1981 claims against the State Defendants were barred by Eleventh Amendment immunity. (Op. of Sept. 26, 2002 at 17-18). The State Defendants argue in the instant motion that plaintiffs' § 1981 claims are now subject to *res Judicata* and collateral estoppel and must be dismissed.

Appendix B

Res Judicata, which is also known as claim preclusion, is the doctrine by which a final judgment of a court is binding upon the parties in any subsequent litigation involving the same cause of action. *Gregory v. Chehi*, 843 F.2d 111, 114 (3d Cir. 1988) ("Claim preclusion replaces '*res judicata*' and encompasses both merger and bar principles in giving dispositive effect in a later action to a prior judgment.") Collateral estoppel, which is also known as issue preclusion, "is somewhat more limited than claim preclusion because it bars relitigation only of an issue identical to that adjudicated in the prior action." (*Id.*) Under these principles, a court may not reconsider claims or issues that were actually decided in the prior case. (*Id.* at 115-16).

Plaintiffs do not address the dismissal of their § 1981 claims in their opposition brief. Accordingly, the Court must conclude that plaintiffs concede that these claims are barred under the doctrines of *res judicata* and collateral estoppel.

IV. Plaintiffs' State Law Claims Under the NJLAD

As in *Bishop I*, because all of plaintiffs' federal claims against the State Defendants have been dismissed, the Court must also dismiss plaintiffs' state law claims against them. (*See* Op. of Sept. 26, 2002 at 21 (citing *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533 (2002)). The Supreme Court in *Raygor* held that state defendants have Eleventh Amendment immunity for all state claims brought in federal court pursuant to 28 U.S.C. § 1367. 534 U.S. at 541-42.

Appendix B

CONCLUSION

For the foregoing reasons, the State Defendants' motion to dismiss plaintiffs' Complaint is granted. That Complaint is dismissed in its entirety, with prejudice and with costs.

s/ John W. Bissell
JOHN W. BISSELL
Chief Judge
United States District Court

DATED: March 10, 2003

(2)

Filed

No. 03-1441

In The
Supreme Court of the United States

DARIUS D. BISHOP, ALVIN C. FLEMING, and JOHN F. BROWN,

Petitioners,

v.

STATE OF NEW JERSEY and THE NEW JERSEY DEPARTMENT OF PERSONNEL and THE MERIT SYSTEM BOARD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF THE STATE OF NEW JERSEY RESPONDENTS

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QUESTION PRESENTED

Was the Title VII complaint time-barred where the EEOC charge was filed well beyond 300 days after the alleged discriminatory examination was administered and eligibility list was promulgated by the State respondents, and the promotions to fire captain made later from the list in rank order by the City of Newark were merely the neutral effects of the allegedly discriminatory examination?

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STATEMENT OF THE CASE

This petition by three firefighters disappointed that they were not promoted to fire captain by the City of Newark, New Jersey, asks the Court to review a decision by the Third Circuit in which that court merely applied the law settled by this Court in *Delaware State College v. Ricks*, 449 *U.S.* 250 (1980), to conclude on the facts that the EEOC charge against the State defendants was untimely, that there was no continuing violation that extended the statutory limitations period and, as a result, that the Title VII discrimination complaint against the State was correctly dismissed by the trial court. There is no compelling reason for this Court to review the Third Circuit's unremarkable application of the standards enunciated in *Ricks* to the particular facts of this case and, therefore, the petition should be denied.

Petitioners Darius Bishop, Alvin Fleming and John F. Brown (collectively referred to as "Bishop") are three African-American firefighters employed by the City of Newark Fire Department (the "City") who passed an examination for promotion to fire captain administered in 2000 by respondent New Jersey Department of Personnel ("Department"). On April 12, 2001, the Department promulgated a list of candidates eligible for promotion to fire captain throughout the State, including the City. Of the 257 candidates in Newark who took the exam, 129 passed and were listed in the order of their score. Bishop was ranked 66 on the list, Fleming held the number 56 spot and Brown was listed at 93. The list had a three-year life and was valid until April 3, 2004.* Municipal fire

* While Bishop's challenge to the examination was pending before the courts below, the Department of Personnel extended the April 12, 2001 eligibility list for one year and, as a result, the list remains valid

departments use the list to promote firefighters to available captain positions in the order in which they are ranked. (Pa2).* The same day that the eligible list was announced, Bishop filed an administrative appeal with respondent Merit System Board, a State entity with statutory authority to adjudicate challenges to civil service examinations in New Jersey. Bishop challenged the format and administration of the examination (Pa3). Ultimately, this appeal was denied. (Pa4).

In December 2001, the City made 15 promotions to fire captain. On January 21, 2002, Bishop filed discrimination charges with the Equal Employment Opportunity Commission ("EEOC") naming only the City. The EEOC charges alleged that the exam unlawfully operated to exclude Bishop from promotion based on race (Pa3). In February 2002, the City made a second round of promotions from the list. Additional promotions were made by the City in July 2002.

On May 7, 2002, Bishop filed a Title VII complaint against the Department and the Merit System Board (the "State defendants") and the City. In this complaint Bishop alleged, in language similar to his earlier EEOC charge, that "the nature and administration of the exam disproportionately excluded plaintiffs from promotion because of their race."** (Pa3). In July 2002, the State defendants

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and will not expire until April 11, 2005. *N.J. Stat. Ann.* 11A:4-6 (authorizing the Department to extend the eligibility list to a maximum of four years).

* "Pa" refers to the appendix accompanying Bishop's petition. Citations below to "Pb" refer to the petition.

** Bishop's petition repeats allegations contained in his May 2002 complaint regarding the alleged disparate impact of the examination and, based on these allegations, he asserts in the petition that "this

moved to dismiss the complaint because Bishop had failed to exhaust administrative remedies. Bishop responded on August 2, 2002 by filing a second EEOC charge, this time naming the State defendants "solely in the remote chance the Court requires such a filing." (Pa16). The EEOC charge against the State parroted the earlier charge, complaining that the "exam had a disparate impact on plaintiffs, that the results were defective and that plaintiffs were discriminated against in the preparation, administration and validation of the exam." (Pa4). On September 26, 2002, the district court dismissed the May 2002 complaint against the State defendants because Bishop had failed to exhaust administrative remedies. The complaint against the City survived and remains pending. (Pa4).

On November 14, 2002, Bishop filed a second Title VII action against the State defendants based on the August 2002 EEOC charge. This complaint was virtually identical

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evidence clearly established a *prima facie* case of discrimination." (Pb2). This assertion and the supporting "evidence" are misleading. *Sup. Ct. R.* 15.1 (obligation to point out perceived misstatements). As a threshold matter, the evidence Bishop asserts as facts are merely untested allegations that were not the subject of any factfinding by the courts below. Moreover, Bishop conveniently overlooks the fact that the examination was given to all candidates for promotion across the State, not just candidates in Newark, pursuant to a 1980 consent decree with the United States Department of Justice (Pa3, n.2). The statewide results of the examination paint quite a different picture. The statewide passing rates on the oral component were 67% for whites and 58% for blacks. The passing rates on the written component were 92% for whites and 79% for blacks. Hence, the ratio for successful African American compared to white candidates across the State for each component of the test was approximately 86%, well above the 80% rate established by the Uniform Guidelines on Employee Selection Procedures. *See* 28 *C.F.R.* §50.14.4D (adverse impact generally is not present when the ratio or "selection rate" is greater than 80%).

to the earlier complaint. The second complaint noted that Bishop's August 2002 charge had been filed within 300 days of the last discriminatory employment practice, namely the July 2002 promotions. (Pa5)

In an order and opinion entered on March 11, 2003, the district court dismissed the November 2002 complaint against the State defendants on the ground that the EEOC charge had not been filed within 300 days of the act of discrimination as required by 42 U.S.C. §2000e-5(e)(1) and therefore was time-barred as outside the statutory limitations period. In reaching this conclusion, the court rejected Bishop's argument that the use of the eligible list to make promotions in February and July 2002 constituted a continuing violation and, as a result, that the EEOC charge filed in August 2002 was timely. (Pa13-Pa27). Bishop appealed.

On January 5, 2004, the Third Circuit issued an opinion affirming the district court's judgment and holding that the limitations period had run by the time Bishop filed his EEOC charge against the State defendants (Pa6-Pa7). The Third Circuit correctly reasoned that its decision was mandated by this Court's opinion in *Delaware State College v. Ricks*, 449 *U.S.* 250 (1980). (Pa7). As instructed by *Ricks*, the court below determined that the precise employment practice challenged by Bishop was the design and administration of the exam and the resulting promulgation of the eligibility list. (Pa9-Pa10). The court also observed that neither Bishop's EEOC charge nor his Title VII complaint alleged that the promotions themselves were discriminatory. (Pa10, n.9). Thus, applying the settled principles established in *Ricks* to the particular facts of this case, the court below rejected Bishop's theory that there was a violation each time a promotion was

made because "[t]he neutral use of the eligibility list by municipal fire departments is merely the effect of the alleged discriminatory exam. Therefore, the statute of limitations began running on the date that the eligibility list was promulgated." (Pa10).

According to the Third Circuit, it made no difference that Bishop had passed the exam and, therefore, stood a chance to be promoted until the list expired in April 2004. The court, applying the principles set forth in *Ricks*, explained that the assignment of an alleged discriminatory ranking is the relevant discriminatory act, even where an adverse employment action is not certain to follow from a low ranking, and the mere possibility of promotion does not mean that the failure to promote is a separate discriminatory act. (Pa11-Pa12). Hence, consistent with the standards enunciated in *Ricks*, the court rejected Bishop's continuing violation theory and affirmed the district court's dismissal of the complaint because the EEOC charge was untimely. (Pa12).

Bishop filed a petition for writ of *certiorari* with this Court on April 2, 2004. The petition was entered on the Court's docket on April 19, 2004.

SUMMARY OF REASONS FOR DENYING THE PETITION

1. The petition should be denied because the Third Circuit merely applied to the particular facts of this case the principle long-settled by this Court in *Delaware State College v. Ricks*, 449 *U.S.* 250 (1980), that the present but neutral effects of a past act of discrimination do not

constitute a continuing violation for the purpose of measuring the limitations periods of Title VII.

2. An administrative charge must be filed with the EEOC within 300 days after the alleged unlawful employment practice. 42 *U.S.C.* §2000e-5(e)(1). In determining whether a charge is timely, a court is required by the express language of Title VII to identify the precise employment practice that is challenged. In making this determination, the focus is on whether a *present* violation has been alleged – the neutral effects, no matter how painful, of a past act of discrimination cannot extend the limitations period. *Ricks*, *supra*, 449 *U.S.* at 257-58.

3. The opinion below merely applied these settled principles to the particular facts of the case and, not surprisingly, concluded that there was no continuing violation that extended the limitations period. Bishop complained that the examination and resulting eligibility list for promotion to fire captain discriminated against him. He did not allege that the City's application or use of the eligibility list was discriminatory. Thus, the examination and resulting promotional list were the discriminatory acts and each failure by the City to promote Bishop was merely the neutral effect of a past act of discrimination that does not constitute a continuing violation.

4. It is of no significance that Bishop passed rather than failed the exam and, therefore, could have been promoted during the life of the eligibility list. The opportunity for promotion does not alter the fact that the administration of the exam and the creation of the eligibility list were the only acts of discrimination. Indeed, Bishop was well aware of his discrimination claim at the time the list was created.

5. Nor is there a conflict between the opinion below and the decisions of other Courts of Appeals, as argued by Bishop in his petition. *Sup. Ct. R.* 10. Contrary to Bishop's claim here, the Fifth and Second Circuits merely held on the particular facts of each case that there was a discriminatory act within the limitations period, not that in every instance the use of a promotional list constitutes a new act of discrimination triggering anew the statute of limitations.

REASONS FOR DENYING THE PETITION

There is no compelling reason why the Court should review this case because the opinion below is consistent with this Court's prior decisions and is not in conflict with the holdings of other Courts of Appeals that have considered this issue. *Sup. Ct. R.* 10. The opinion below merely applied the well-established principle that the Title VII limitations periods begin to run from the time of the alleged discriminatory act, not from when the neutral consequences of the discrimination are felt. *Delaware State College v. Ricks, supra,* 449 *U.S.* at 258 (1980). This unremarkable application of settled law does not warrant further review.

An administrative charge of discrimination must be filed with the EEOC no later than 300 days after the alleged unlawful employment practice. 42 *U.S.C.* §2000e-5(e)(1). Timely filing of the charge is a prerequisite to the maintenance of a Title VII action. *Alexander v. Gardner-Denver Co.*, 415 *U.S.* 36, 47 (1974). In determining whether a charge is timely, it is necessary to identify precisely the unlawful employment practice that is

challenged. *Ricks, supra*, 449 *U.S.* at 257. As explained in *Ricks*, the limitations period commences when the allegedly discriminatory acts took place, not when the consequences of those acts became most painful. *Ricks*, at 258. Thus, the limitations period cannot be extended based on a party's claim that a neutral practice that took place within the applicable limitations period gives present effect to past illegal acts that took place outside of the limitations period. All the court below did was apply these settled standards governing the Title VII limitations periods to the particular facts of the discrimination claim asserted by Bishop.

The Third Circuit properly recognized that its decision was mandated by the standards enunciated by this Court in *Ricks*.* There, a professor at Delaware State College challenged the college's decision to deny him tenure as unlawfully based on national origin discrimination. After tenure was denied, and consistent with its usual practice, the college entered into a one-year "terminal" contract with Ricks that allowed him one extra year of employment before his actual termination. *Id.*, 449 *U.S.* at 252-54. Ricks set forth a "continuing violation" theory, arguing that his unlawful termination claim accrued on his final date of employment because discrimination not only motivated the original tenure denial decision but also the

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* The court below also relied on its decision in *Bronze Shields, Inc. v. New Jersey Dept. of Civil Service*, 776 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 *U.S.* 1122 (1982), which held that Newark's use of an eligible list to hire police officers was not a continuing violation, but merely the neutral consequence of the earlier discriminatory promulgation of the hiring list. However, it is not necessary to discuss separately the court's opinion in *Bronze Shield* because, as the court observed here, *Ricks* alone compelled the decision in Bishop's case. (Pa7).

later termination decision under the one-year terminal contract. 449 *U.S.* at 256.

This Court rejected Ricks' continuing violation theory on the facts presented and held that the limitations period began to run on the date when the college made the tenure decision, not upon the expiration of his contract. In reaching this decision, the Court explained that it first had to identify precisely when, in the words of Title VII, the "unlawful employment practice" that Ricks challenged took place. *Ricks*, *supra*, 449 *U.S.* at 257. Ricks argued that both the tenure decision and the college's decision to terminate him were discriminatory. The Court pointed out, however, that his argument could not be squared with the complaint because he did not allege any discriminatory acts that continued to the actual termination of his employment. 449 *U.S.* at 257. As the Court explained,

> [i]n order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure. But no suggestion has been made that Ricks was treated differently from other unsuccessful tenure aspirants. [449 *U.S.* at 258].

Thus, the Court concluded that the only alleged discrimination occurred at the time Ricks was informed of the tenure decision and the limitations period commenced at that time. This conclusion was required, the Court added, "even though one of the *effects* of the denial of tenure – the eventual loss of a teaching position – did not occur until later." *Id.*, at 258. In this regard, the Court observed that the proper focus is on the time of the discriminatory acts,

not the time when the consequences of the act became most painful. *Ibid.*

These principles compelled the court below to dismiss Bishop's discrimination claim as time-barred and to reject his continuing violation theory. The only acts alleged by Bishop to be discriminatory were the examination and promulgation of the eligibility list. Tellingly, Bishop continues to maintain in his petition for review by this Court that all of his claims "stem from a discriminatory examination, which was used to create an eligibility list of firemen who could be promoted to the position of fire captain for the City of Newark." (Pbi). Hence, there was no question in this case that the "unlawful employment practice" challenged by Bishop was the discriminatory exam.

Just as Ricks did not allege that the later termination decision was discriminatory, Bishop did not allege that the later consequences of the alleged discriminatory exam – the City's failure to promote him – were themselves discriminatory. Bishop did not allege, as *Ricks* teaches he must to avoid having his complaint dismissed as untimely, that the manner in which the decision was made not to promote him differed from the manner in which the City failed to promote other candidates on the list. *Ricks, supra*, 449 *U.S.* at 258. As in *Ricks*, Bishop has not suggested that he was treated differently from other unsuccessful candidates for promotion. Indeed, there is no question in this case that all candidates were treated alike and the City made promotions simply on the basis of a candidate's rank on the list. Therefore, the Third Circuit correctly concluded, consistent with the mandate by this Court, that the neutral use of the eligibility list by the City to make promotions was merely the effect of the alleged

discriminatory exam and, as a result, the complaint against the State defendants was time-barred because the limitations period began running on the date the eligibility list was promulgated. (Pa9-Pa10).*

This conclusion is not altered by any argument Bishop has advanced. Bishop reasons that *Ricks* and *Bronze Shield* do not control his case because he was on the eligibility list and therefore stood a chance to be promoted until the list expired. (Pb8-Pb10). He should not be expected, the argument goes, to pursue his rights as a matter of judicial economy until the list expires. This reasoning, however, was flatly rejected in *Ricks*. The Third Circuit in *Ricks* had reasoned, along lines similar to those advanced here, that the initial decision to terminate might be reversed and, therefore, an aggrieved employee should not be expected to resort to litigation until he was injured by the actual termination on the last day of employment. Thus, the lower court held that the limitations period did not start to run until the terminal contract had expired. *Ricks, supra*, 449 *U.S.* at 255-56. However, the Supreme Court reversed, ruling instead that the limitations period

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* The principles in *Ricks* were recently affirmed by the Court in *National Railroad Passenger Corp. v. Morgan*, 536 *U.S.* 101 (2002). Discussing with approval the holding in *Ricks*, the Court in *Morgan* explained that Ricks "could not use a termination that fell within the limitations period to pull in the time-barred discriminatory act [the discrete decision to deny tenure]. Nor could a time-barred act justify filing a charge concerning a termination that was not independently discriminatory." 536 *U.S.* at 113. Likewise, in the present case, Bishop could not use a failure to promote "that fell within the limitations period to pull in the time-barred discriminatory act" alleged to be the examination and resulting eligibility list. Nor could the time-barred examination justify filing a charge concerning a failure to promote that was not alleged to be independently discriminatory.

started to run when the tenure decision was made known to Ricks. 449 *U.S.* at 259.

In this case, Bishop filed an administrative appeal challenging the examination on the very day in April 2001 that the eligibility list was announced. Clearly, he was well aware that he had been injured by the exam when the list was published and he showed no interest in avoiding premature litigation. As the court below wisely observed, Bishop's concern for the conservation of judicial resources "does not transform neutral effects into allegedly discriminatory acts" (Pa11). *Accord Cox v. City of Memphis*, 230 *F.*3d 199, 205 (6th Cir. 2000) ("the assignment of an allegedly discriminatory ranking is the relevant discriminatory act even where the low ranking is not a 'certain prelude' for an adverse employment action").*

Bishop also mistakenly asserts that *Ricks* does not apply to his case because, unlike the isolated instances of discrimination in *Ricks*, his claim is based "on an ongoing and continuing practice of discrimination that began with the 2000 promotional examination and continues with each promotion made from the list derived from that examination." (Pb9). Significantly, Bishop does not refer to any allegation in his EEOC charge or Title VII complaint to support this assertion or to suggest that the promotions themselves were anything more than the neutral effects of the discriminatory examination. This is precisely the reason the Court held in *Ricks* that the tenure decision, not the termination of the professor's employment, was the

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* If Bishop's theory is correct, and he should not be expected to pursue his rights until the eligibility list expires and the effects of the examination will be certain, then the discrimination claim he has asserted in this case is premature because the list does not expire until April 2005.

unlawful employment practice that triggered the limitations period.*

Finally, there is no conflict among the lower appellate courts that requires this Court's review. *Sup. Ct. R.* 10(a). Bishop relies exclusively on *Walls v. Mississippi State Dept. of Public Welfare*, 730 *F.*2d 306 (5th Cir. 1984) and *Guardians Association, etc., et al. v. Civil Service Comm'n*, 633 *F.*2d 232 (2d Cir. 1980), *cert. denied sub. nom., Civil Service Comm'n v. Guardians Association etc., et al.*, 463 *U.S.* 1228 (1983), for the observation that these courts, unlike the Third Circuit below in this instance, applied the continuing violation theory in cases involving the use of hiring lists. (Pb10). This observation is unexceptional and certainly does not raise a conflict. After all, *Ricks* does not rule out the application of the continuing violation theory in all hiring list cases and neither did the Third Circuit in this case or in *Bronze Shield*. Rather, the court below held that Bishop had not alleged a discriminatory use of the promotional eligibility list that might extend the limitations period. In other words, Bishop failed to allege facts that could support a continuing violation theory.

The Third Circuit's holding below is consistent with the two opinions relied on by Bishop in his petition. In *Walls*, black candidates who were not hired for social worker positions with the Mississippi Public Welfare Department alleged in their EEOC charge, unlike Bishop

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* Similarly unavailing is Bishop's notion that the limitations period cannot be interpreted to deprive him of the right to pursue his discrimination claim (Pb6). To the contrary, the time limitations provided by Congress reflect " 'a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.' " *Ricks, supra* 449 *U.S.* at 260 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 *U.S.* 454, 463-64 (1975)).

in this case, that each stage in the selection process was discriminatory, including the establishment of preliminary educational requirements, the development of the examination, the creation of the certificates of eligibles, and the hiring decisions themselves. As the court found, the ranking of the candidates on the certificates, which was based on an invalid examination, was but one factor in the subjective selection process that was applied to the plaintiffs in Mississippi. Here, unlike the selection process in *Walls*, promotions were made by the City strictly in rank order and Bishop did not allege that the promotions were carried out in a discriminatory manner. Thus, the black candidates in *Walls* had filed a timely charge because, unlike Bishop in this case, they had alleged discriminatory acts that continued throughout the subjective selection process.

Likewise, the Second Circuit concluded in *Guardians* that the EEOC charge was timely because, unlike the firefighters in Bishop's case, the minority police officers in *Guardians* had alleged a continuing violation, which began with a discriminatory examination and culminated in the City's refusal to hire them. *Guardians*, *supra*, 633 *F.*2d 250-51. The trial court in *Guardians* had found, and the appellate court declined to disturb the finding, that the refusal to hire within the limitations period was indeed based on the City's discriminatory policy. *Guardians*, *supra*, 633 *F.*2d at 237, n.7. In marked contrast to *Guardians*, there are no comparable allegations or findings of discrimination concerning the promotions in Bishop's case and, therefore, there is no conflict between *Guardians* and court's opinion below.

Even if the result in *Guardians* could be read to be at odds with the Third Circuit's view in this case, there still

can be no conflict because at the time it issued the *Guardians* decision, the Second Circuit did not have the benefit of this Court's guidance in *Ricks*, which required that the illegal employment practice must be identified with precision because the neutral effects of a past act of discrimination cannot extend the limitations period. Therefore, the court's holding in *Guardians* cannot possibly conflict with either the standards enunciated by this Court in *Ricks* or the decision of the court below in Bishop's case. Certainly, the conflict asserted by Bishop does not support this Court's exercise of discretionary review.* *Sup. Ct. R.* 10(a).

In conclusion, the Third Circuit decision for which review is sought merely applied well-established principles governing the application of the Title VII limitations periods to the circumstances of this case and correctly concluded that Bishop's EEOC charge was untimely. Bishop alleged that the examination and resulting eligibility list were discriminatory, but he did not allege that the list was applied to him in any way that differed from its application to other unsuccessful candidates for promotion. Therefore, for purposes of Title VII, the "unlawful employment practice" that triggered the 300-day limitations period for filing an EEOC charge was the examination and eligibility list, not the later promotions, which

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* Nor is a conflict suggested by Bishop's passing reference (Pb11-Pb12) to two other appellate opinions – *Gonzalez v. Firestone Tire & Rubber Co.*, 610 *F.*2d 241 (5th Cir. 1980), and *Beavers v. American Cast Iron Pipe Co.*, 975 *F.*2d 792 (11th Cir. 1992). Just as in *Guardian* and *Walls*, the courts in *Gonzalez* and *Beavers* determined that the charges were timely because the plaintiffs had alleged continuing discriminatory acts within the limitations period. Bishop made no such allegation about the City's promotions, and the court below determined that Bishop's challenge was limited to the discriminatory exam and list.

were the neutral effects of the past allegedly discriminatory examination. This unexceptional conclusion presents no compelling reason requiring further review by this Court and Bishop's petition for a writ of *certiorari* should therefore be denied.

CONCLUSION

For all of the reasons expressed here, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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